



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

October 27, 1992

Mr. Max J. Werkenthin, III  
Attorney  
The University of Texas System  
Office of General Counsel  
201 West Seventh Street  
Austin, Texas 78701-2981

OR92-613

Dear Mr. Werkenthin:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 17376.

The University of Texas System (the "system") has received a broad request for information relating to the system's investment in the North American Fund II, L.P. ("NAF"), a Delaware limited partnership. Specifically, the requestor seeks seven categories of information:

1. Copies of any Private Placement Memoranda and any other offering materials provided to the State of Texas, the University of Texas System, P.U.F. or any of their agents or representatives, by NAF II, or any of its agents or representatives, for the purpose of soliciting investments in NAF II, or for consideration in evaluating investments in NAF II.
2. Copies of any and all correspondence, memoranda or other materials provided to the State of Texas, the University of Texas System, P.U.F., or any of their agents or representatives, by any party other than NAF II, or any of its agents or representatives, in support of NAF II's solicitation of P.U.F., and/or P.U.F.'s consideration of an investment or investments in NAF II.

3. Copies of any and all contracts, partnership agreements or other materials setting forth the contractual, partnership and/or other legal relationship between NAF II or its general partner, North American Business Development Co., L.C. and the State of Texas, the University of Texas System or P.U.F.
4. Copies of any and all correspondence between NAF II, or any of its agents or representatives, and the State of Texas, the University of Texas System, P.U.F., or any of their agents or representatives.
5. Copies of any and all reports, whether periodic or special, memoranda, correspondence and any other documents provided by NAF II to the State of Texas, the University of Texas System, P.U.F. or any of their agents or representatives, which refer or relate to the business of NAF II, its performance or its investments, including, but not limited to NAF II's investments in ACR Electronics, Inc., Minnesota Educational Computing Corporation, Gateway Healthcare Corporation or Astra Precision Products, Inc., now known as AMTEC Precision Products, Inc.
6. Minutes, notes or other memoranda regarding meetings, telephone conversations and other contracts between NAF II, its general partner, agents or representatives with the State of Texas, the University of Texas System, P.U.F., or any of their agents or representatives, members of the Office of Investment, and/or members of the Investment Advisory Committee, regarding P.U.F.'s decision to invest in NAF II and/or P.U.F.'s investment in NAF II.
7. Any filing, correspondence, memoranda, notes or other documents indicating any relationship between NAF II, its general partner, agents, representatives or principals, and any members of the University of Texas Board of

Regents, System Administration, Office of Investments,  
Office of Endowment Management and Administration  
and/or Investment Advisory Committee.

You advise us that some of the requested information has been made available to the requestor. You claim, however, that the remaining information, which has been submitted to us for review, is excepted from required public disclosure by section 3(a)(4) of the Open Records Act.

Section 3(a)(4) excepts from required public disclosure "information which, if released, would give advantage to competitors or bidders." The purpose of section 3(a)(4) is to prevent one competitor or bidder from gaining an unfair advantage over others. Open Records Decision No. 541 (1990). Ordinarily, section 3(a)(4) may not be claimed to protect a governmental body's "competitive advantage" because it cannot be regarded as being in competition with private enterprise. Open Records Decision No. 463 (1987). However, where a governmental body is authorized by constitutional or statutory law to invest its securities, the governmental body may be deemed, with regard to those investments, a "competitor" in the marketplace for purposes of section 3(a)(4). Open Records Decision No. 593 (1991) (copy enclosed) (holding that the Teacher Retirement System, as an entity that is authorized by both constitutional and statutory law to invest its securities, may be deemed a "competitor" in the marketplace for purposes of section 3(a)(4)); *see also* Open Records Letter OR91-606 (copy enclosed) (holding that the Houston Municipal Employees Pension Fund System may be deemed a "competitor" in the marketplace for purposes of section 3(a)(4)). Whether release of particular information would harm the legitimate marketplace interests of a governmental body deemed a "competitor" requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.*

You advise us that the requested information relates to an investment made by the system's Board of Regents in its capacity as trustee for the system's Permanent University Fund ("PUF") and in its capacity as trustee for the system's Common Trust Fund ("CTF"). The PUF is established under the terms of article VII, section 11, of the Texas Constitution, which provides, in pertinent part:

it is hereby declared all lands and other property heretofore set apart and appropriated for the establishment and maintenance of the University of Texas, together with all the proceeds of sales of the same, heretofore made or hereafter to be made, and all

grants, donations and appropriations that may hereafter be made by the State of Texas, or from any other source, except donations limited to specific purposes, shall constitute and become a Permanent University Fund.

Article VII, section 11, limits PUF investments to certain state and federal bonds. *Id.* Article VII, sections 11a and 11b, provide that a wider range of investments are available to the PUF than section 11 originally provided. *See also* Texas Education Code § 66.01. In particular, section 11b provides, in pertinent part:

Notwithstanding any other provision of this constitution, in managing assets of the permanent university fund, the Board of Regents of The University of Texas System may acquire, exchange, sell, supervise, manage, or retain, through procedures and subject to restrictions it establishes and in amounts it considers appropriate, any kind of investment . . . that persons of ordinary prudence, discretion, and intelligence, exercising the judgement and care under the circumstances then prevailing, acquire or retain for their own account in the management of their affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

Given the constitutional and statutory authorization provided the system for purposes of investment, we conclude that the system may be considered a "competitor" for purposes of section 3(a)(4) with regard to its investment of PUF funds.

We turn next to the system's Common Trust Fund ("CTF"), from which the Board of Regents in its capacity as trustee also allocated money for purposes of investment in NAF. You advise us that the CTF was originally established in 1932 under the name "Funds Grouped for Investment" under the Board of Regent's authority "to accept, retain in depositories of its choosing, and administer gifts, grants, or donations of any kind, from any course, for use by the system or any of the component institutions of the system." Educ. Code § 65.31. Section 65.36 of the Education Code governs system acceptance of donations for professorships and scholarships and provides, in pertinent part:

[d]onations of property may be made and accepted by the board for the purpose of establishing or assisting in the establishment of a professorship or scholarship in the university system or any of its component institutions, or for creating in the university system or any of its component institutions any trust for any lawful, educational, or charitable purpose, either temporarily or permanently.

Educ. Code § 65.36(a).

With respect to the organization and operation of the CTF, you advise us as follows:

The Common Trust Fund is operated under the terms of a Charter adopted by the Board of Regents and is structured like a mutual fund in that each individual endowment purchases units in the fund at market value. Each individual endowment admitted to the CTF must be under the sole control, with full discretion as to investments, of the Board of Regents. The CTF Charter provides . . . that all assets in the CTF are vested in the Board of Regents as a fiduciary and may be invested and reinvested by the Board in all investments permitted by Texas law for funds held by Trustees under the Texas Trust Code.

Section 113.056 of the Texas Trust Code lays out the standards for trust management and investment and provides, in pertinent part:


a trustee shall exercise the judgment and care under the circumstances then prevailing that persons of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income from as well as the probable increase in value and the safety of their capital.

Property Code § 113.056(a).

The CTF charter in conjunction with section 113.056 of the Trust Code creates a fiduciary relationship between the Board of Regents, which acts as trustee, and each individual endowment. In the situation presented for our review, the CTF has an ongoing interest in a privately held company.<sup>1</sup> The system's share in the company is sizeable. The system is a member of the company's advisory board and given special access to the company's financial information and investment portfolio. Release of information about the company to competitors would clearly undermine the system's investment and the company's profitability in a highly competitive market and would violate the CTF's fiduciary duty to its individual endowments. The CTF clearly has marketplace interests. Because the creation and operation of the CTF is authorized by statutory law, the CTF may be deemed a "competitor" subject to protection under section 3(a)(4) of the Open Records Act. Having reviewed your arguments relating to the specific harm which release of the information at issue here might bring about, and having reviewed the documents themselves, we conclude that the information for which you assert the section 3(a)(4) exception may be withheld from required public disclosure under section 3(a)(4) of the Open Records Act.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR92-613.

Yours very truly,

  
Rick Gilpin  
Assistant Attorney General  
Opinion Committee

RG/GCK/lmm

Enclosures: Open Records Decision No. 593  
Open Records Letter OR91-606

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<sup>1</sup>We assume for purposes of this decision that the investment under consideration complies with the terms of the CTF charter and with statutory requirements under article 65.36 of the Education Code.

Ref.: ID# 17376

cc: Mr. Howard A. Davis  
Shefsky & Froelich Ltd.  
444 North Michigan Avenue  
Chicago, Illinois 60611  
(w/o enclosures)